APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 87-2445-Civ-NESBITT

FRANK KELLY, MARIA KELLY, ET AL., PLAINTIFFS

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,
a Delaware corporation, DEFENDANT

CORRECTED ORDER GRANTING SUMMARY JUDGMENT

[Filed Aug. 7, 1990]

The matters pending before the Court are 1) a motion for summary judgment filed by Defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), 2) Plaintiffs' motion to voluntarily dismiss Count II of the complaint without prejudice, and 3) Plaintiffs' motion to compel answers to interrogatories. After the motions were fully briefed and oral argument heard thereon, the Court enters the following Order.

Statement of the Case

Plaintiff Frank Kelly was a Merrill Lynch account executive who worked at the Merrill Lynch office in Coral Gables. Kelly not only worked at Merrill Lynch but also invested his and his wife's funds through Merrill Lynch. In addition, Kelly advised the remaining Plaintiffs, who

also maintained accounts at Merrill Lynch, concerning their investments.[1]

Between late 1982 and late 1986 each of the Plaintiffs opened securities accounts with Merrill Lynch. In connection with the opening of their accounts, each of the Plaintiffs executed a "Standard Option Agreement" and a "Customer Agreement" prepared by Merrill Lynch that spelled out the risks of option trading. They also received a brochure entitled "Characteristics and Risks of Standardized Options," which Merrill Lynch always supplied customers before permitting them to trade in options. The agreements signed by Plaintiffs clearly provide that Merrill Lynch may at any time require additional collateral for the continued maintenance of their trading positions.

Plaintiffs contend that prior to the time the Plaintiffs commenced trading in short index options, Merrill Lynch represented to Kelly that it would require the following for all trades in short index options by Plaintiffs: [2]

> (a) an initial margin requirement of the greater of the option premium plus 2% of the market value of the underlying index or the option premium plus 5% of the market value of the underlying index any out-of-the-money amount;
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> (b) a minimum equity in the account of at least $10,000 after all new transactions and subsequent commitments in the account; and

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[1] There are 15 plaintiffs in this action, including 14 individuals and one corporation. The individual and corporate Plaintiffs will be referred to as the individual Plaintiffs or Plaintiffs; Kelly will be referred to by his name or together with the other individual and corporate Plaintiffs.

[2] Prior to the time Plaintiffs opened their accounts, Kelly told each of the Plaintiffs the substance of Merrill Lynch's Equity Requirement and its margin requirements.

(c) a margin maintenance requirement of the greater of the option premium plus 2% of the market value of the underlying index or the option premium plus 5% of the market value of the underlying index or the option premium plus 5% of the market value of the underlying index less any out-of-the-money amount.

Merrill Lynch's requirements for the trading of short index options were in part based upon an exchange-imposed formula for calculating daily margin maintenance requirements as set by the Chicago Board of Options Exchange ("The CBOE") and the New York Stock Exchange ("NYSE"). If an account fell below the margin maintenance requirements, which were subject to change, the customer would receive a "maintenance call," which required the customer to deposit more monies in the account to decrease Merrill Lynch's exposure to losses. It was Kelly's understanding, however, that the equity requirement stated above would not change during the life of Plaintiffs' investment activity.

The options which Kelly and the other Plaintiffs traded were not options to purchase or sell tangible goods or securities. Rather, Plaintiffs chose to invest in Standard & Poor's 100 Stock index ("the S & P 100 index") options, which were traded on the CBOE under the symbol "OEX." Plaintiffs traded in "combinations," the simultaneous sale of put and call options on the same underlying stock index. This kind of trading is profitable only during periods when the market is relatively stable. In an unstable market, one in which the market is subject to violent swings up or down, this kind of trading results in losses. Index options cannot be written on credit, and Defendant did not extend credit to any of the Plaintiffs to purchase or sell the options.

In January 1987, the stock market moved dramatically against the option positions held by Plaintiffs. The S & P 100 index increased steadily from a close of 231.09 on December 31, 1986 to a close of 272.96 on January 30,

1987. The sharp increase of the S & P 100 index was accompanied by a sharp increase in the price of many of the options that Plaintiff had sold short. In turn, the Plaintiffs' financial exposure increased substantially. In late January 1987, in response to unprecedented volatility in the market, Merrill Lynch increased its maintenance requirements. Effective February 6, 1987, Merrill Lynch required Plaintiffs to maintain minimum equity in their accounts of $2,000 per contract or combination. This change in requirements was adopted by Merrill Lynch as a firm-wide policy on March 27, 1987. Some Plaintiffs deposited additional funds to comply with Merrill Lynch's increased requirements; most, however, did not.

By the end of January 1987, all the positions in the Kellys' joint account were closed. As of February 9, 1987, Kelly's individual account was closed. The other Plaintiffs either continued their option trading or merely retained the positions they held at the time the new requirement went into effect, until Merrill Lynch closed their positions. The majority of the other Plaintiffs did not produce the additional funds required by Merrill Lynch before February 6, 1987, or at any time thereafter. During the period from February to April 1987, the market continued to move unfavorably to Plaintiffs and exposed them to increasing losses. As the accounts failed to meet Merrill Lynch's new requirements, Merrill Lynch would liquidate as many of each of Plaintiffs' open option positions as necessary to bring each Plaintiff's account into compliance with the applicable rules. Because the total market price of the options had risen substantially from the time Plaintiffs had sold them to the time Merrill Lynch bought them back to close Plaintiffs' open positions, Plaintiffs realized losses at the time their positions were liquidated. Plaintiffs who continued trading in the Winter of 1987 suffered greater losses than the Plaintiffs whose accounts were first closed by Merrill Lynch. Plaintiffs now seek to recover these losses.

Plaintiffs filed a complaint alleging violations of the federal securities laws. By Count I of the complaint, Plaintiff asserts a Section 10B and 10b-5 claim against Merrill Lynch for its failure to disclose all material facts regarding the terms and conditions applicable to trading short index options at the time the accounts were opened.[3] Specifically, Plaintiffs claim that Merrill Lynch without any prior notice or warning arbitrarily changed its requirements for trading short term options from $10,000 per account to $2,000 per contract or combination. Plaintiffs claim that had they known of this requirement, they would not have engaged in their short index option trading strategy and therefore would not have sustained the losses incurred upon the liquidation of their accounts.

Upon a thorough review of the pertinent portion of the depositions, affidavits and pleadings, the Court finds the Plaintiffs have failed to establish the existence of any genuine issue of material fact with respect to at least one necessary element of a Rule 10-b claim.[4] Plaintiffs have failed to demonstrate that Merrill Lynch acted with scienter.

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[3] Plaintiffs candidly admit that they can obtain all the relief necessary to make them whole through their 10b-5 claim (Count I), and do not want to burden the Court by pursuing the 10b-16 claims as asserted in Count II. Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Summary judgment, filed February 13, 1990 at page 2.

[4] Although the complete absence of any evidence of scienter, discussed *infra*, is reason enough for this Court to grant Defendant summary judgment, the Court also finds that Plaintiffs have failed to adduce any evidence that the misrepresentation or omission caused Plaintiffs' loss, which is an essential element of Plaintiffs' claim. *See Rousseff v. E.F. Hutton Co., Inc.*, 843 F.2d 1326 (11th Cir. 1988). Plaintiffs' loss was clearly the result of adverse market trends unconnected to Defendant's misrepresentations, and there is no guaranty that Plaintiffs would not have lost even more money had they continued to trade.

DISCUSSION

1. *The Scienter Requirement*

Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful to "use or employ, in connection with the purchase or sale of any security . . . any manipulative device or contrivance." 15 U.S.C. §78j(b). Rule 10b-5, promulgated by the Securities Exchange Commission, pursuant to Section 10(b), prohibits any artifice to defraud or any act which "operates or would operate as a fraud or deceit." 17 C.F.R. § 240.10b-5. A successful cause of action under Section 10(b) requires that the plaintiff demonstrate each of the following five factors: (1) a misstatement or omission, (2) of a material fact (3) made with scienter (4) upon which the plaintiff relied (5) that proximately causes plaintiff's loss. *McDonald v. Alan Bush Brokerage Company*, 863 F.2d 809, 814 (11th Cir. 1989).

In *Ernst & Ernst v. Hochfelder*, 96 S. Ct. 1375, 1381 (1976), the Supreme Court held that, to recover under Rule 10b-5, a plaintiff must plead and prove scienter in connection with a misrepresentation or omission to state material facts. Scienter is "an intent to deceive, manipulate or defraud." *Ernst*, 96 S. Ct. at 1381 n.12. In *Ernst*, the Supreme Court left open the question of whether scienter comprises not only malicious intent but also reckless disregard for the truth. The Eleventh Circuit, however, has held that a showing of "severe recklessness" can satisfy the scienter requirement. *See McDonald, supra.* The court has defined narrowly the circumstances under which actions or omissions could rise to the level of severe recklessness:

> 'Severe recklessness is limited to those highly unreasonable omissions or misrepresentations that involve not merely simply or ever excusable negligence, but extreme departure from the standards of ordinary

> care, and that present in danger of misleading buyers or sellers which is either known to the Defendant or so obvious that the defendant must have been aware of it.'

McDonald, 863 F.2d at 814 (quoting *Broad v. Rockwell International Corp.*, 642 F.2d 929 (5th Cir.) (*en banc*), *cert. den.*, 102 S. Ct. 506 (1981)).

In the complaint, Plaintiffs have alleged that Merrill Lynch committed fraud by failing to disclose that the Equity Requirement was subject to change when the accounts were opened. However, much of Plaintiffs' argument focuses on Merrill Lynch's behavior in early 1987 when Merrill Lynch "changed the rules" and "arbitrarily changed its Equity Requirement for trading short index options in *January 1987*." (Plaintiffs' Memorandum pp. 13-14, 17-18).

Plaintiffs cannot rely on Merrill Lynch's conduct in January 1987 to prove scienter at the time the alleged fraud took place, *i.e.*, when the customers accounts were opened. *Huddleston v. Herman & MacLean*, 640 F.2d 534, 546 (5th Cir. 1981), *aff'd in part and rev'd in part*, 103 S. Ct. 683 (1983) ("whether a Defendant's action in a Rule 10b-5 case violate the standard of care imposed by the Rule . . . is to be determined as of the time of the actions complained of."). Plaintiffs must prove that Merrill Lynch acted with scienter when they failed to disclose material facts to Plaintiffs.

Plaintiffs have alleged that Merrill Lynch acted intentionally with severe recklessness, but have not offered any evidence which shows that Merrill Lynch acted with such culpability, whether at the time the accounts were opened, or in January 1987. A review of the evidence in the record reveals only one serious attempt to introduce proof on the issue of scienter. Plaintiffs' expert witness, Frank Ibarra, states in paragraph 41 of his affidavit that

> It is my opinion that Merrill Lynch's failure to disclose to Plaintiffs that it could change its Equity Requirement . . . was highly unreasonable and constituted an extreme departure from the standard of ordinary care expected of a broker/dealer in securities. It is also my opinion that Merrill Lynch's failure to disclose to Plaintiffs that it could change its Equity Requirement . . . presented a danger of misleading Plaintiffs which was either known to Merrill Lynch or was so obvious that Merrill Lynch must have been aware of it . . . . In short, I believe that Merrill Lynch was severely reckless in its dealings with Plaintiffs and caused Plaintiffs to sustain tremendous losses.

Mr. Kelly makes similar conclusory allegations regarding Merrill Lynch's conduct. Such statements cannot create an issue of material fact regarding scienter. As stated by the Eleventh Circuit, "[t]his court has consistently held that conclusory allegations without specific supporting facts have no probative value." *Evers v. General Motors Corp.*, 770 F.2d 984 (11th Cir. 1985). Although purportedly based upon a review of the relevant evidence, Mr. Ibarra's affidavit fails to provide any factual support for his opinions. Thus, his conclusions regarding "severe recklessness" do not create an issue which precludes summary judgment. Nor do Mr. Kelly's allegations, which are equally devoid of factual support.

Plaintiffs' theory of the case is that as the customer agreements,[5] signed when they opened their accounts in

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[5] At the time the Plaintiffs opened their accounts they signed a standard Customer Agreements which provided that Merrill Lynch had the right to require additional collateral:

> (1) in accordance with its general policies regarding its margin maintenance requirements, as such may be modified, amended, or supplemented from time to time; or
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> (2) if in Merrill Lynch's discretion it considers it necessary for its protection at an earlier or later point in time than called for by said general policies. . . .

1984, referred only to margin maintenance requirements as collateral, and were silent as to equity, Merrill Lynch recklessly omitted to disclose to Plaintiffs that it could increase its equity requirements, as it did in January 1987. In fact, Kelly states that Merrill Lynch led him to believe that the equity requirement would not change.[6] As a consequence, the Plaintiffs claim they were induced to open their margin accounts without being told this necessary information for trading short index options. As alleged in the complaint, this omisssion constituted a "scheme or artifice to defraud the Plaintiffs," the purpose of which was to "induce Plaintiffs to open their respective margin accounts and to purchase and sell securities to their detriment." (Complaint paragraphs 34-35).

Plaintiffs have offered no evidence, circumstantial or otherwise, that Plaintiff made statements or omissions to "induce Plaintiffs . . . to purchase and sell securities to their financial detriment." Merrill Lynch is in the business of securing customers who will make money, not lose money as alleged, and Plaintiffs have introduced absolutely no proof to the contrary.

Even assuming Merrill Lynch should have spelled out in detail each and every form which additional collateral could take once more money was required to cover losses in the customer's account,[7] Merill Lynch's failure to dis-

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[6] The fact that Merrill Lynch represented orally to Plaintiffs its equity requirements for trading in short index options would not preclude recovery. The Eleventh Circuit has recognized that an investor may under certain circumstances rely on oral misrepresentation to recover under Rule 10b-5. *Bruschi v. Brown*, 876 F.2d 1526, 1529 (11th Cir. 1989). In considering the evidence in the light most favorable to the Plaintiff, the Court regards this allegation as true, notwithstanding that this representation is not in the Customer Agreement.

[7] The parties have presented a great deal of evidence by affidavits and otherwise regarding the distinction between "margin" and "equity." For the purpose of this Order the Court will not resolve

close amounts to, at most, an "inadvertent oversight" insufficient to establish scienter. *Dwoskin v. Rollins, Inc.*, 634 F.2d 285, 301 (5th Cir. 1981). Moreover, even if Kelly were advised by Merrill Lynch that its "minimum equity requirement of $10,000 per account . . . would remain constant . . . regardless of the number of option portions held and regardless of the relationship between those positions and the market value of the underlying index," (Kelly affidavit, p.4, paragraph 11), this is not sufficient to demonstrate a "deliberate or intentional scheme to manipulate." *Fryling v. Merrill Lynch Pierce, Fenner & Smith*, 593 F.2d 736, 743 (6th Cir. 1979). Reasonable investors should have known that they would be called upon to cover their obligations when their accounts began to reflect losses. *Eriksson v. Galvin*, 484 F. Supp. 1108 (S.D.N.Y. 1980) ("no duty to disclose information to one who reasonably should already be aware of it."); *see also Zerman v. Ball*, 735 F.2d 15 (2nd Cir. 1984) (withheld information so basic any investor should shown of it.)

In *Prudential-Bache Securities Inc. v. Stricklin*, 890 F.2d 704 (4th Cir. 1989), Associate Justice Powell discussed the relationship between a brokerage house and customer when dealing in short term options. Referring to a particular customer agreement provision allowing for liquidation without notice, he stated that

> Such provisions are reasonable in the volatile and risky put options market. A brokerage house should not have to risk a nearly unlimited amount of its

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this esoteric disagreement, which the Court deems a distinction without a difference. However, no reasonable investor could fairly believe that when losses began to occur in their account, Merrill Lynch could not request increased collateral to cover those losses, regardless of the nomenclature. The Court will assume for the purpose of this Order that the Plaintiffs have presented sufficient evidence to create an issue of fact as to the differences in the terms.

> own funds . . . while waiting 24 hours to see if a client can meet a margin call.
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> * * *
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> Furthermore, even without reliance . . . on the Client Agreement, appellee would be entitled to judgment as a matter of law. In general an individual who opens a brokerage account is responsible to the brokerage house for losses on that account.

Id. at 707.

Clearly, the reasonable investor should know that the brokerage house is not required to risk its own funds on behalf of its customers.

In a Section 10b action, a plaintiff carries a heavy burden: "[m]ost significantly he must prove that the defendant acted with scienter . . . ." *Herman & MacLean v. Huddleston*, 103 S. Ct. 683, 687 (1983). The Court recognizes that "proof of defendant's knowledge or intent [in a Rule 10-5 action] will often be inferential," and that circumstantial evidence can be sufficient to withstand a motion for directed verdict as to a material element. *Herman*, 640 F.2d at 546-547. Nevertheless, taken in light most favorable to Plaintiffs, Plaintiffs' allegations are such that no reasonable juror could conclude that Merrill Lynch's original disclosures were so lacking so as to infer the presence of "severe recklessness" or the "intent to deceive, manipulate or defraud." Merrill Lynch clearly disclosed that it could require additional collateral at any time, and that it could liquidate Plaintiffs' accounts if the collateral was not provided. Moreover, it is not alleged that Merrill Lynch promised Plaintiffs that it would always accept premiums from newly-written options to meet its collateral requirements. Clearly, such a scenario would pose a substantial, and unreasonable, risk for Merrill Lynch.[8]

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[8] Plaintiffs' entire argument is predicated on the theory that they should have been allowed to ride out any unfavorable movement in the market by supplying premiums from newly-written options as

Plaintiffs' alternative theory of fraud, which is raised in the complaint, is that Merrill Lynch failed to disclose adequately the new equity or collateral requirements in January 1987.

The typical January 1987 letter from J. Guillermo Castro, Vice President of Merrill Lynch's Coral Gables Branch read as follows:

> I am writing you in order to assure myself that you are aware of the recent movements of the stock market. I am attaching, hereto, an article that appeared in the New York Times magazine about what is happening in the market. As you can see, the volatility was so great, it was unprecedented.
>
> Due to this volatility, our firm has imposed stricter requirements regarding short term options. The minimum requirements have been doubled.
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> Your account currently has the necessary balance to cover your current position. However, certain setbacks have occurred during the past two weeks that you should be aware of in order to decide whether or not you wish to remain in the market. In the event you wish to withdraw from the program, as of the close of business on Monday, January 26, your account had a balance of $32,144.

Although the letters were different with respect to certain aspects of each account, all Plaintiffs were sent an essentially identical letter notifying them of the changes in the equity requirements. Specifically, Plaintiffs were notified that Merrill Lynch had increased the requirements for maintaining their positions. The nature of the new requirement was described, and Plaintiffs were told

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collateral. Such a strategy is obviously unsound, to say the least, because the premiums are only a short-term gain and writing additional options would expose the Plaintiffs to even greater losses. Plaintiffs could not realistically expect their strategy to work indefinitely under any adverse market conditions.

whether additional collateral was immediately required. If additional collateral were not required immediately, Plaintiffs were informed that additional collateral might be required in the future. Plaintiffs were also told that if the equity in their accounts fell below the requisite levels, some or all of their positions could be liquidated without further notice. Although some Plaintiffs allege that they did not receive this letter, the evidence is uncontroverted that Merrill Lynch mailed these letters to Plaintiffs in a timely fashion.

Moreover, there is no evidence that Merrill Lynch's decision to raise the equity requirements was motivated by malice towards Plaintiffs. Advising the client that because of "movements in the stock market" that "stricter requirements regarding short term options would be imposed" and requiring additional collateral does not rise to "conduct so extreme as to be the form of intentional conduct or behavior equivalent to deceive, manipulate, or defraud." *Huddleston v. Herman, supra.* By its very language the stricter requirements regarding short term options were "due to unprecedented volatility in the market." Kelly has asserted in his affidavit that Merrill Lynch's rule change was "arbitrary and wrongful" and that Merrill Lynch engaged in a "deceitful course of business and material nondisclosure," which prevented Plaintiffs from reversing their setbacks. (Kelly affidavit, paragraphs 39 and 41). Plaintiffs have evidenced disenchantment with their losses, but little else. No evidence has been presented that Merrill Lynch's actions were such an extreme departure from the standards of ordinary care to support a 10-b claim.

Kelly was an experienced broker and was acting as a representative for the other Plaintiffs in their dealings with Merrill Lynch. Merrill Lynch made sure that Plaintiffs were aware they were trading in a volatile and risky area. For example, on each option agreement there is a notation in capital letters stating that the customer has re-

ceived and read a booklet describing the risks and uses of options and that the customer is aware of the special risks attendant to option trading. Merrill Lynch acted in accordance with the customer agreements which expressly authorized it to impose new requirements for maintaining their option accounts in open positions and to liquidate Plaintiffs positions if such requirements were not met. Even if the Plaintiffs are correct that it was unreasonable for Merrill Lynch to increase to "equity requirements," it has not shown Merrill Lynch's misrepresentation or omission to be "severely reckless." Unreasonableness does not meet the standard for scienter. *McDonald,* 863 F.2d at 815.

In summary, Plaintiffs have made no showing that Merrill Lynch's alleged omissions and statements represented an extreme departure from the standards of ordinary care and presented a danger of misleading Plaintiffs which was either known to Merrill Lynch or was so obvious they must have been aware of it. Neither have Plaintiffs adduced any proof that at time the Plaintiffs opened their accounts or in January 1987 that Merrill Lynch acted with evil motive or intent to deceive, manipulate, or defraud so that, as alleged in the complaint, Plaintiffs would be induced to "open their respective margin accounts with Merrill Lynch and to purchase and sell securities to their financial detriment."

2. *Summary Judgment*

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted if "there is no genuine issue as to any material fact and [if] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Rule 56(c) mandates summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the case, on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett,* 106 S. Ct. 2548, 2552-53 (1986). Further, the non-moving party

must raise an issue for trial by showing that there is sufficient evidence for a jury to return a verdict for the non-moving party. If the evidence is merely colorable or not significantly probative, summary judgment will be granted. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510-11 (1986).

Under Rule 56(e) a party opposing a summary judgment motion must "set forth specific facts showing there is a genuine issue for trial." This means that sufficient probative evidence must be identified under which the non-moving party would be entitled to prevail. The Plaintiffs cannot rest on their allegations of scienter without "any significant probative evidence of scienter to support the complaint." *Anderson*, 106 S. Ct. at 2510.

A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation. *Mutual Fund Investors v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977).

The potential for abuse of 10b-5 actions has been recognized by the Supreme Court in *Blue Chip Stamps v. Manor Drug Stores*, 95 S. Ct. 1917, 1927 (1975). Although Plaintiffs may feel wronged by Merrill Lynch's disclosures both at the time the accounts were opened and in February 1987 when the requirements for trading index options were changed, Plaintiffs have not shown any specific facts that Merrill Lynch's conduct was "so extreme as to be the form of intentional conduct or behavior equivalent to an intent to deceive or defraud."

After discovery has been completed, as in this case, the Supreme Court has held that the entry of a summary judgment is mandatory against a party failing to show the existence of an essential element to prevail at trial. *Celotex Corp. v. Catrett*, 106 S. Ct. at 2552. Factual disputes that are irrelevant will not be counted. In determining what is a material fact, "the substantive law

will identify which facts are material" and the Court must evaluate the evidence presented by the substantive evidentiary burden." *Brown v. Crawford,* Case No. 89-5927 (11th Cir. July 24, 1990).[9]

Under the appropriate materiality analysis, Plaintiffs have failed to demonstrate a necessary element in countering the summary judgment motion; they have not shown a genuine issue of fact as to scienter. As stated above, Plaintiffs have made no showing that the Defendant alleged statements and omissions represented an extreme departure from the standards of ordinary care which presented a danger of misleading Plaintiffs which was either known to Defendants or so obvious they must have been aware of it.

Conclusion

For the reasons stated in this Order, it is

ORDERED AND ADJUDGED that Merrill Lynch's motion for summary judgment is GRANTED as to Count I of the complaint, for the reasons stated above. It is further

ORDERED AND ADJUDGED that Plaintiffs' motion to dismiss Count II of the complaint is GRANTED in part. Count II of the complaint is DISMISSED with prejudice, for the reasons stated by the Court at the hearing on June 11, 1990. It is further

ORDERED AND ADJUDGED that Plaintiffs' motion to compel answers to interrogatories is DENIED as moot.

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[9] At oral argument Plaintiffs urge that under Merrill Lynch's internal procedure manual, they were prohibited from raising their Equity Requirements. Even if this contention were true, violation of internal policies do not rise to the level of law or public policy and so does not raise a genuine issue of material fact with regard to scienter. *Thomson McKinnon Securities v. Clark,* 901 F.2d 1568 (11th Cir. 1990) ("whether the firms non-trading policy was in place . . . is not a genuine issue of material fact that would preclude summary judgment.").

A separate final judgment was entered on August 6, 1990. The Court reserves jurisdiction for the assessment of appropriate costs.

DONE and ORDERED in chambers, Miami, Florida this 7th day of August 1990.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
United States District Judge

cc: counsel of record